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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Estate of CATHERINE BRADLEY, Deceased.	B241549
ALEX BORDEN, as Personal Representative, etc., Petitioner and Respondent, v. VERONICA DISE, as Personal Representative, etc., Objector and Appellant.	(Los Angeles County Super. Ct. No. BP111164)

APPEAL from a judgment of the Superior Court of Los Angeles County, Reva Goetz, Judge. Affirmed.

Law Offices of Eugene Schneider and Eugene Schneider for Objector and Appellant.

Borden Law Office, Alex R. Borden and Priya Bahl for Petitioner and Respondent.

Appellant Veronica Dise is the personal representative of the estate of Bessie Moore, who was the appointed conservator of her sister, Catherine Bradley and upon Bradley's death became a beneficiary of Bradley's estate. Before this court, appellant challenges a judgment of the probate court that approved the final account and statutory attorney fees and commissions for respondent Alex R. Borden, the personal representative of the Bradley estate. Appellant argues that the probate court lacked jurisdiction to issue its ruling, relied on the wrong basis to value Bradley's estate, relied on the wrong value to assess statutory fees and commissions and failed to consider alleged ethical violations when it determined the amount of statutory fees and commissions for respondent. As we shall explain, appellant has failed to demonstrate error. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Catherine Bradley ("Bradley") and Bessie Moore ("Moore") were sisters. In 2004, the court appointed Moore as Bradley's conservator. Respondent Alex R. Borden is an attorney who was hired by Moore to open the conservatorship proceedings.[2]

Moore, acting as Bradley's conservator, directed respondent to pursue legal proceedings to recover Bradley's real property that had been transferred to third parties by means of fraud. The litigation was successful and a judgment was obtained in the amount of $241,350, plus attorney's fees of $59,867.50 and costs of $5,074.29.[3] The defendants in that action did not pay the judgment, so the judgment, including the attorney's fees and costs ("the uncollected judgment") became an asset of the conservatorship estate. Bradley passed away in 2007.

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[1] The Factual and Procedural Background describes only those facts and circumstances that are relevant to the issues on appeal.

[2] The conservatorship matter was filed, and all matters heard, in the Southwest District (Torrance) branch of the Los Angeles Superior Court.

[3] The properties had also been encumbered; the legal proceedings did not set-aside the encumbrances on the properties.

Moore became distraught over her sister's passing and decreased her communication with respondent. During that time respondent advised Moore that the conservatorship needed to be finalized and a probate proceeding needed to be opened. Respondent sent at least two letters asking Moore to comply with his advice.

In April 2008, respondent received a letter stating that one of the properties owned by Bradley that had been the subject of the prior litigation was going to be foreclosed upon. Respondent urged Moore to either seek her own appointment as administrator or to find somebody else to do it. At one point, Moore indicated that she wanted to nominate her godson to be the estate administrator. Respondent met with the godson, but according to respondent he was never formally asked to petition for the godson's appointment as administrator.

Respondent received additional foreclosure notices for Bradley's real property. Acting to preserve the property, respondent asked Moore to release him as her attorney for the conservatorship matters so that he could open the probate estate and prevent the foreclosures. Moore replaced respondent and hired Eugene Schneider[4] to replace respondent as counsel for conservatorship matters.

After respondent was replaced, he filed a petition with the court as a creditor[5] to become the personal representative of Bradley's probate estate. The court appointed Borden the estate administrator in July 2008.

In late 2008 and early 2009, respondent sold two of Bradley's Properties leaving the probate estate with cash on hand of about $50,000 and the $306,291.79 in uncollected judgments.

The conservatorship final account was approved in October 2009. Moore passed away and appellant Veronica Dise became the personal representative of Moore's estate. Several months after the conservatorship's final accounting was approved, appellant filed

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[4] Schneider is the attorney for appellant.

[5] Respondent was still owed $59,867.50 in attorney fees from representing the conservatorship in obtaining the judgment.

a motion to reduce the value of the uncollected judgment from $328,412.79 to $0. Respondent filed the Final Account for the probate estate in January 2010. After receiving objections, both respondent and his counsel reduced their request for ordinary fees.

In September 2010, appellant filed a "surcharge" petition against respondent and his counsel. Appellant also filed several objections to the probate court's final account of the Bradley estate. She objected to the final account for the Bradley estate, arguing that the court did not have the requisite authority to proceed, that the basis of statutory fees was incorrect, that extraordinary fees were improper and that both respondent and his lawyer should be surcharged. The trial court found that respondent should be surcharged in the amount of $328, and thereafter the court approved the final account and the statutory fees. The court denied two of the surcharge petitions with prejudice. The trial court also took judicial notice of the court file in the conservatorship matter. This appeal followed.

DISCUSSION

Appellant asserts that the probate court committed several errors in handling the transition between closing Bradley's conservatorship estate and opening Bradley's probate estate. First, appellant contends that the probate court lacked jurisdiction at the time it approved the final order and distribution of Bradley's probate estate. Second, appellant argues that the court erred in its calculation of statutory fees and commission by using the wrong valuation of Bradley's estate and ignoring alleged ethical violations by counsel. We address the arguments in turn.

I. The Probate Court's Jurisdiction

Appellant's assertion that the probate court had no jurisdiction rests in three theories: (1) the probate court was required to stay probate proceedings until the conservatorship finalized; (2) the court should have deemed the two proceedings related; and (3) the Bradley Estate was exempt from probate. As we shall explain, these arguments lack merit.

A. *The Probate Court was Not Required to Wait for Conservatorship Proceedings to Finalize*

Appellant argues the Bradley's probate proceedings should not have commenced while the conservatorship estate's final accounting was pending. We do not agree.

Conservatorship and probate proceedings are closely related. Proceedings for conservatorship estates and decedent estates are both handled by the same probate branch of the Los Angeles Superior Court system, and the California Probate Code governs conservatorship and probate proceedings.

Under the Probate Code, a conservatorship terminates once the conservatee dies but the probate court maintains jurisdiction over the conservatorship estate for "the purposes of settling accounts of the guardian or conservator or for any other purpose incident to the enforcement of judgments and orders of the court upon such accounts." (Prob. Code, § 1860, § 2630.[6]) In addition, the conservator's duties to conserve the estate continue to provide a final accounting of the conservatorship and pay final expenses. (§§ 2467, 2631, subd. (a).) If the conservator wishes to have more power and control over the conservatorship assets after the death of conservatee, the conservator must petition under section 2631, subdivision (b).

Appellant relies on *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, which considers the powers a conservator retains after the death of the conservatee. The court determined the probate court's appointment of a successor conservator to provide a final accounting after the conservatee's death was valid. The court upheld the appointment by reasoning that at the time the successor was named, the conservatorship had not yet been finalized and could not be finalized until the probate court made the appointment. Therefore the appointment was "incident to" the court's ability to close the conservatorship. (*Id.* at p. 1089.) The court further stated, "the scope of the [probate] court's jurisdiction should be construed broadly to accomplish [the goal of settling the

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[6] All code sections relate to California Probate Code unless otherwise noted.

accounts of the conservatorship]" and that the probate court has "general jurisdiction." (*Id.* at pp. 1087, 1090.)

In *Conservatorship of Starr* (1989) 215 Cal.App.3d 1390, a conservator brought an action related to a third party issue before the conservatorship closed. The court held that despite the pending conservatorship proceedings, the trial court had jurisdiction to decide the issue because the third party suit had to be resolved in order for the conservatorship to provide its final accounting. (*Id.* at p. 1395.)

The conclusion that other legal actions may be commenced while the conservatorship proceedings are pending finds support in older case law as well.

In *Livermore v. Ratti* (1907) 150 Cal. 458, the Supreme Court of California held that final guardianship proceedings were not valid unless an estate administrator had been named. Although the court's decision focuses on notice, the case shows that the probate court proceedings had to begin before the conservatorship could conclude. (*Id.* at p. 465.) In the case, the conservator was ordered to pay off the expenses of the guardianship but could not until the estate was opened and an administrator was "legally in existence in his representative capacity" to act. (*Id.* at pp. 465-466.) The conservatorship's finality depended on the decedent estate opening and proceeding; and without the estate, the conservator could not properly conclude the conservatorship. (*Ibid*.)

More than 60 years later, the court in *In re Ehle* (1968) 267 Cal.App.2d 24 held that a guardian to a deceased ward did not need formal permission to pay certain guardian's attorney expenses. The guardian had made the request of the estate administrator but the court cited the continuing jurisdiction of the guardianship to allow the guardian to settle final expenses without special permission. (*Id.* at pp. 28-29.) Again, as in *Livermore*, the decedent's probate estate was allowed to open and proceed despite the court acknowledging the pending guardianship and the lingering jurisdiction that accompanied a deceased ward.

In sum, these precedents taken together demonstrate that probate and conservatorship proceedings can be pending simultaneously.

B. *At All Times During the Relevant Accounting Period, the Estate Maintained a Value in Excess of $150,000 and Could Not Have Been Considered Exempted from Probate Under Section 13100*

Next, appellant argues section 2467 modifies the "date of death" valuation set forth by section 13052 and therefore the Bradley estate should have been deemed a small estate that is exempt from probate. We reject this interpretation of the law.

Section 13100 provides that if the gross value of a decedent's real and personal property does not exceed $150,000, the estate may avoid probate and administration. For the purposes of a section 13100 valuation, the estate's gross value is calculated based on the "date of the decedent's death as the date of valuation of the property." (§ 13052.)

The "date of death" valuation is common throughout California's probate laws. After the death of decedent an inventory is taken which includes any "money owed to the decedent" (§ 8850). The probate referee then appraises the inventory based on section 8802 which provides "the inventory and appraisal . . . shall state the fair market value of the item at the time of the decedent's death. . . ."

Here, the Bradley Estate could never have avoided probate because on the "date of death," the estate far surpassed the limit set by section 13100. Even under appellant's own theory, the estate would have been valued at $675,000 the day the conservator court ordered the assets to be distributed to the estate administrator.[7]

Further, there is no statute or case law that provides that section 2631 is a modification that would require us to deviate from the "date of death" valuation other than provided in section 13100. Accordingly, the Bradley estate never could have avoided probate, and we reject appellant's argument that the estate should have been exempt from the probate court's jurisdiction.

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[7] The final account in the conservatorship showed assets of $675,000 in real property and $306,291.79 in uncollected legal judgments.

C. *The Court did not abuse its discretion when it failed to order the two pending cases related under California Rules of Court, Rule 3.300*

Appellant contends the probate court was required by California Rules of Court, rule 3.300 to merge the conservatorship proceedings and the probate proceedings into one proceeding.

Although rule 3.300 requires the parties to provide the court with notice that two pending cases are related, there is no language to suggest the court must order the cases related. In relevant part the rule expresses that "if all the related cases have been filed in one superior court, the court, on notice to all parties ***may*** order that the case, including probate and family law cases be related and may assign them to a single judge or department." (Cal. Rules of Court, rule 3.300(h)(1); emphasis added.)

In this case, the court was put on notice of the pending conservatorship action and did not order the cases related. The court has discretion to order cases related, and we reverse only when an abuse of discretion is shown. An abuse of discretion standard is applied where "a discretionary power is inherently or by express statute vested in the trial judge" and the court only disturbs that discretion "on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) In *Tritek Telecom, Inc. v. Superior Court* (2009) 169 Cal.App.4th 1385, 1390-1391, an appellate court ordered the superior court to deem four cases related under rule 3.300 because they dealt with related matters but were being decided by three different judges. Ordering them related was essential because there was a possibility of conflicting rulings on discovery matters. The instant case is different. Although one court dealt with ending the conservatorship and another was preparing the estate's distribution, there was no possibility of the two courts producing conflicting rulings.

Here, appellant filed the required notice and the court took judicial notice of the pending conservatorship proceedings. The court acknowledged the existence of the pending proceeding and decided not to deem the cases related. Appellant has presented no convincing argument that the court's action was improper or capricious.

II. The Court Did Not Miscalculate the Statutory Fees and Commissions Owed the Personal Representative and His Attorney

Appellant asserts that the court used the wrong estate valuation to calculate fees and failed to consider respondent's alleged ethical violations when awarding ordinary and extraordinary fees to the personal representative and his attorney. We disagree.

A. The Court Did Not Err When it Used a Date of Death Valuation to Calculate Statutory Fees for the Estate Administrator and His Attorney

Appellant argues that the correct basis to determine the statutory fees for the personal representative and his attorney is the date the conservatorship assets are "delivered" to the probate estate. Similar to appellant's jurisdiction argument, there is no legal basis for appellant's assertions.

Sections 10800 and 10810 contain fee schedules for the statutory fees of the personal representative and his attorney respectively. Both statutes provide statutory compensation based on the value of the estate, which is further clarified in section 8802, describing the basis as being "property appraised at its fair market value at the time of death . . . without reference to encumbrances or other obligations on estate property." (§ 8802.) Here the court relied on the "date of death" to assess attorney fees and in doing so, did not err.

Appellant asserts that respondent did not reduce the value of the uncollected judgment because he wanted to collect a higher statutory fee. However, after Bradley passed there was nothing respondent could do to alter the fair market value at death. At the time of Bradley's death, the uncollected judgment no longer had its full value; while it is correct that respondent initially sought statutory fees based on the full amount, after appellant objected to fees, respondent and his counsel voluntarily requested lower fees based on a valuation that omitted the uncollected judgment's value.

Appellant additionally complains that the Bradley estate still included respondent's attorney fees that had not yet been paid. Appellant refers to this situation as "fees on fees" and relies on *Estate of Trynin* (1989) 49 Cal.3d 868, 871 to demonstrate the inequity of the situation. Contrary to appellant's position, in *Estate of Trynin* the

court allowed "fees on fees" noting that the probate code allows "fees on fees" and that any contrary rule "would ultimately be deleterious to decedents' estates and heirs because attorneys would be reluctant to perform services necessary to the proper administration . . . if the compensation awarded for their services could be effectively diluted or dissipated by the expense of defending against unjustified objections to their fee claims." (*Ibid*.) Here, appellant has failed to adequately prove the error.

Additionally, appellant fails to show that respondent's fee would have been any different had the attorney fees been collected before the probate proceeding. The statutory compensation schedule offers compensation based on large ranges of dollar amounts. Appellant has not demonstrated that removing payable attorney fees would have put the estate in a different bracket of compensation.

B. The Court Did Not Improperly Calculate Fees

Next, appellant asserts that the court should considered ethical conduct when awarding statutory fees to the personal representative and his attorney. This argument ignores the court's findings.

The trial court, having heard the testimony and considered the evidence, made no findings that Borden acted without proper authority or in violation of any law. The court did find that Borden improperly failed to advise the Probate Referee that the judgments were uncollectible, but, as discussed below, the court surcharged Borden for this action. Based on the record before us, there is substantial evidence supporting the court's findings. Accordingly, appellant has failed to demonstrate any basis for limiting the award of statutory fees.

Under sections 10801 and 10811 the court "may allow" extraordinary fees in an amount the court determines is "just and reasonable." (§ 10801, § 10811.) This means the court "may take into consideration all matters relating to the administration of the particular estate, such as the value of the estate, the kind and character of the assets, the effort involved in the care and preservation of estate property, and such other facts as bear upon the labor and effort of the executor, administrator and attorney in the routine administration of the estate [and] [f]inally . . . ordinary fees to which such persons are

entitled . . . ." (*Estate of Hilton* (1996) 44 Cal.App.4th 890, 912-913; see also *In re Estate of Walker* (1963) 221 Cal.App.2d 792, 795-796.)

Extraordinary fees are "a matter of sound discretion" and the trial court's decision is only disturbed on appeal "for an abuse of discretion." (*In re Turino's Estate* (1970) 8 Cal.App.3d 642; see also *In re Fulcher's Estate* (1965) 234 Cal.App.2d 710.)

In *Estate of Stevenson* (2006) 141 Cal.App.4th 1074 the court determined the trial court's award of $200,000 in attorney fees was not an abuse of discretion where the appellant was asking for $1 million.

In *In re Merritt's Estate* (1950) 98 Cal.App.2d 70 the appellate court found the trial court did not abuse its discretion when it awarded extraordinary fees in an amount that exhausted the entire estate. The court reasoned that the executrix and her attorney performed "remarkably well" where the two had engaged in seven lawsuits, held over 500 conferences and paid off over $1 million in creditor claims. Even though their efforts did not bring any new assets into the estate, the appellate court affirmed the trial court noting that the trial court was in a "much better position to evaluate the circumstances than the appellate court." (*Id.* at p. 76.)

Here, the court did not abuse its discretion in awarding extraordinary fees to respondent and his counsel because the court considered the time spent, the effort involved in preserving the estate, the sale of two properties and defending against numerous objections. The court awarded respondent $7,053 in extraordinary fees after considering that he had sold two properties, prepared notices, made court appearances, reviewed documents and defended the final account and the surcharged petition. The court awarded respondent's counsel $19,785 in extraordinary fees for his representation of respondent based on appearing at hearings, reviewing and responding to formal discovery motions, defending against numerous objections, and for the hours spent at the January 2012 trial. Given these efforts, appellant has not demonstrated that these awards were unjust, and we cannot say that the trial court erred in awarding these fees.

After awarding ordinary and extraordinary expenses, courts can still affect what the personal representative's award of compensation should be. Under section 9601, if the court finds that the personal representative breached a fiduciary duty, the court may "charge" with the amount of loss, depreciation in value due to the breach, any profit resulting from the breach or any profits that would have occurred absent the breach. (§ 9601, subd. (a).) This charge is called a "surcharge" and it acts to effectively reduce what the personal representative earns from his administration of the estate. If the court finds the personal representative has acted reasonably and in good faith, the court has discretion whether or not to administer the surcharge. (§ 9601, subd. (b).)

In *Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, the court found the probate court abused its discretion when it surcharged an estate administrator for losses from the sale of a home but upheld surcharges where the estate administrator had paid himself unauthorized fees and rented a property for free. The court found the estate administrator could not be surcharged for losses from the sale of a home because there was no evidence of fraud or collusion; instead the evidence showed the decline in value was due purely to a depressed real estate market. (*Id*. at p. 472.) However, the court upheld several surcharges in the amount of $184,200 where the estate administrator had let a person live in a house rent free, voted himself the president of a defunct corporation, commingled personal funds with corporation funds, transferred property to himself, did not seek authorization from the probate court, did not keep the probate court informed, hired a corporate manager and an accountant to pay the mortgage of a defunct corporation. (*Ibid.)*

The situation in *Estate of Bonaccorsi* stands in contrast to the facts in this case. Respondent in his role of estate administrator, prevented foreclosures of two properties, sold two properties, and researched the uncollected judgment[8] to prevent detriment to the estate. Additionally, the trial court found that respondent did not violate any law or act

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[8] See also section 9650, subdivision (a)(1) "the personal representative . . . is not accountable for any debts that remain uncollected without his or her fault."

without proper authority. The court reasoned that respondent did not improperly marshal assets under appellant's "delivery" theory and, he went through the lawful methods necessary to become the estate administrator. Nonetheless, the trial court decided to surcharge respondent for $328 for failing to tell the probate referee that in his opinion the uncollected judgment's value was $0. Here we do not find that the trial court abused its discretion relation to the surcharge issues.

The trial court is in a better position to evaluate the good faith of respondent's actions. We rely on the court's determination that respondent did not breach his fiduciary duties. Consequently, appellant has not shown that the trial court's decision was an abuse of discretion.

DISPOSITION

The judgment is affirmed. Respondent is entitled to his costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J. **SEGAL, J.**[*]

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[*]Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.